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Wednesday, March 22, 2006

Metabolite prediction

Based on yesterday's oral arguments in *LabCorp v. Metabolite*, Harold Wegner predicts the likelihood that Justice Stevens will write the majority opinion and that this opinion will reverse and remand the case to the Federal Circuit. That court had held that the patent claim combining a scientific discovery with a prior art blood test was patentable.

My observation is that if Stevens,who wrote the old anti-software-patent opinion in *Parker v. Flook*, keeps to his old (and the Supreme Court's old) philosophy regarding subject matter patentability, and extends his comments beyond "laws of nature" to other expressly forbidden categories (one of which is "algorithms"), there will be fireworks for business method patents and even software patents. Even if the Court applies a *Flook*-type methodology without expressly excluding algorithms from the scope of its argument, this could set a very big precedent that could be used to attack software and business method patents.

I have previously written about the connection between *Metabolite*'s controversy over patenting "laws of nature" and the origin of software and business method patents. In the paper "Elemental Subject Matter" I further describe how software came to be patentable despite the express prohibition against patenting "algorithms," and highlight the differences between the Federal Circuit's software-patent-friendly philosophy and Justice Steven's software-patent-hostile philosophy -- a difference of philosophy that easily extends to the "law of nature" at issue in *Metabolite*, raising the possibility that *Metabolite* will set a precedent redounding back onto software and business method patents.

If *Flook* is applied in this way to reverse *Metabolite*, thus creating uncertainty about the validity of software and business method patents, expect a hue and cry among corporate lobbyists here on K Street, resulting in legislation to expressly designate software, business methods, or both as patentable categories of subject matter.

There are, however, several other possible rationales for invalidating the patent in *Metabolite*, so Stevens may have a hard time gathering five votes to apply the *Flook* methodology here. Expect the Court's decision in June.

Posted by Nick Szabo at 10:50 AM

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Nick Szabo

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